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Fourth Amendment-Exclusionary Rule-Impeachment Use of Illegally Seized Evidence when Defendant Testifies

Martha A. Roof

FOURTH AMENDMENT—EXCLUSIONARY RULE—IMPEACHMENT USE OF ILLEGALLY SEIZED EVIDENCE WHEN DEFENDANT TESTIFIES—*People v. Taylor,* 8 Cal. 3d 174, 501 P.2d 918, 104 Cal. Rptr. 350 (1972).

A sharply divided California Supreme Court recently resurrected a limitation on the impeachment use exception to the Fourth Amendment exclusionary rule thought laid to rest by the United States Supreme Court early in 1971. In *People v. Taylor*[1] a four justice majority of the California court, led by Justice Mosk,[2] held that evidence obtained by a search conducted in violation of the Fourth Amendment could not be used to impeach the testimony of a defendant who on direct examination merely denied the charges against him. The dissenting justices[3] felt the decision should have been controlled by *Harris v. New York,*[4] wherein a similarly divided United States Supreme Court allowed statements obtained in violation of the Fifth Amendment privilege against self-incrimination to be used for impeachment purposes.

Earl Taylor and a female companion were arrested on a charge of grand theft of an automobile. Searches of the vehicle turned up various narcotics and related paraphernalia.[5] During trial on charges arising from discovery of this contraband, Taylor denied ownership of the articles and denied having ever seen certain of the evidence except at the preliminary hearing and a prior trial.[6] On cross-examination, the prosecutor launched into a broad line of questioning, despite repeated objections by Taylor's counsel.[7] After eliciting Taylor's admission that he had

1. 8 Cal. 3d 174, 501 P.2d 918, 104 Cal. Rptr. 350 (1972).

2. Justices Peters, Tobriner and Sullivan concurred in Justice Mosk's opinion.

3. Justice Burke wrote the dissenting opinion. He was joined by Chief Justice Wright and Justice McComb.

4. 401 U.S. 222 (1971). An analysis of the *Harris* case and a review of the impeachment exception to the exclusionary rules is contained in Note, *The Reconstitution of Self-Incrimination: Harris v. New York,* 5 LOY. L.A.L. REV. 193 (1972) [hereinafter cited as *Reconstitution*].

5. 8 Cal. 3d at 176, 501 P.2d at 919, 104 Cal. Rptr. at 351. The legality of these searches was not at issue in *Taylor. Id.*

6. *Id.* at 177, 501 P.2d at 920, 104 Cal. Rptr. at 352. The prior trial resulted in a mistrial. *Id.*

7. *Id.* at 177-78, 501 P.2d at 920, 104 Cal. Rptr. at 352. Among the questions asked on cross-examination was whether Taylor had ever seen narcotics before, whether he had ever seen heroin before, whether he had ever seen balloons before, and whether he had ever had a balloon in his possession containing heroin. *Id.* at 178, 501 P.2d at 920, 104 Cal. Rptr. at 352.

some familiarity with various narcotics,[8] the prosecuting attorney asked him if he had ever been arrested with a balloon of heroin in his possession. After lengthy in-chamber hearings on a defense objection to this question, the trial judge ordered Taylor to answer. Taylor admitted he had once been stopped on a street corner and searched and that the searching officer had removed a "little piece of balloon" from his (Taylor's) pocket, but claimed that he had not put the balloon in the pocket, thus permitting the inference that the searching officer had done so.[9]

To rebut this inference, the prosecutor called police sergeant Luther McCormick, a witness to the street search. McCormick narrated a scene wherein he and another officer had seen Taylor, who was apparently " 'under the influence of something,' " crossing a street early in the morning.[10] The other officer stopped Taylor, subjected him to a "pat-down" search, and reached into his pocket, removing a balloon of heroin. Although the defense objected that the search was illegal and that evidence concerning it should therefore be excluded,[11] the trial court held the evidence to be admissible for the limited purpose of impeachment. Sergeant McCormick then testified that "he had seen nothing in the officer's hand as it was thrust into defendant's pocket" and that the balloon removed from Taylor's pocket contained heroin.[12] The jury, which had been instructed that the only purpose for which the sergeant's testimony might be used was to impeach the credibility of Taylor, thereafter found Taylor guilty as charged.[13]

Taylor appealed the judgment of conviction, claiming, as he had at the time of trial, that the impeachment allowed was precluded by the

8. Taylor explained "that he had been raised 'in the lower-class section of the town,' " and had seen marijuana cigarettes and "red devils." *Id.*

9. This search was conceded to have been conducted in violation of both United States and California constitutional provisions prohibiting unreasonable searches and seizures. The *Taylor* court pointed out that merely appearing to be " 'under the influence of something' while lawfully crossing a street at an early hour did not give the police reasonable grounds to believe he was 'armed and dangerous' " as required for a pat-frisk without a warrant under Terry v. Ohio, 392 U.S. 1 (1968), and Sibron v. New York, 392 U.S. 40 (1968). 8 Cal. 3d at 178-79, 501 P.2d at 921, 104 Cal. Rptr. at 353. Additionally, California authorities do not allow the feeling of a soft object in a pocket during a search for weapons to justify going into the pocket for purposes of self-protection. *Id.* at 179, 501 P.2d at 921, 104 Cal. Rptr. at 353.

10. 8 Cal. 3d at 178, 501 P.2d at 920-21, 104 Cal. Rptr. at 352-53.

11. *Id.*, 501 P.2d at 921, 104 Cal. Rptr. at 353.

12. *Id.* at 178-79, 501 P.2d at 921, 104 Cal. Rptr. at 353.

13. The ability of a jury to distinguish between use of evidence to prove the truth of the matter stated or merely to impeach a witness, and to rely only on the former in reaching a verdict has often been questioned. *Reconstitution, supra* note 4, at 211.

decisions of the United States Supreme Court in *Agnello v. United States*[14] and *Walder v. United States.*[15] In *Agnello* the defendant, on direct examination, denied involvement in an alleged conspiracy to sell cocaine.[16] During cross-examination, despite objection, the prosecutor was allowed to ask Agnello whether he had ever seen narcotics before. Agnello denied any knowledge of or involvement with narcotics. He was then questioned concerning a can of cocaine which had been obtained through an illegal search during the investigation of the alleged conspiracy. When Agnello denied having previously seen the cocaine, the prosecution rebutted with evidence concerning the search and seizure of the cocaine from Agnello's home.[17] Relying on the reasoning in *Silverthorne Lumber Co. v. United States,*[18] the *Agnello* Court held that where the defendant did not testify on direct examination concerning the illegal evidence, and where in response to the cross-examination allowed he had merely denied ever seeing the contraband, he "did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search."[19]

It was the *Taylor* majority's view that the later case of *Walder v. United States,*[20] although allowing impeachment use of illegally seized evidence, reaffirmed by distinction the *Agnello* doctrine. In *Walder,* during a trial for selling narcotics, the defendant testified of his own accord during direct questioning (and again during cross-examination) that he had never sold or possessed narcotics. In the light of this "sweeping claim," the Court ratified the use for impeachment purposes of testimony concerning heroin unlawfully obtained from Walder two years earlier in an unrelated transaction. Although it was conceded that such illegally obtained evidence could not be used

14. 269 U.S. 20 (1925).

15. 347 U.S. 62 (1954).

16. Agnello and others were charged with conspiracy to sell cocaine without having registered with the Collector of Internal Revenue and having payed the prescribed tax. 269 U.S. at 28. During direct examination, Agnello testified that he had received packages from a co-defendant, but did not know their contents and would not have carried them had he known they contained narcotics. *Id.* at 29.

17. *Id.* at 30. Evidence concerning the finding of the can of cocaine had previously been offered and excluded on Fourth Amendment grounds. *Id.*

18. 251 U.S. 385 (1920). The *Silverthorne* Court declared:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. *Id.* at 392, *quoted in Agnello,* 269 U.S. at 35, and *Taylor,* 8 Cal. 3d at 181, 501 P.2d at 922, 104 Cal. Rptr. at 354.

19. 269 U.S. at 35.

20. 347 U.S. 62 (1954).

against the defendant in the case in chief, the Court refused to allow the defendant to "turn the illegal method by which evidence . . . was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths."[21] Such a perversion of the Fourth Amendment was decried by the Court.

Based on its analysis of *Agnello* and *Walder,* the majority in *Taylor* concluded "that a defendant 'must be free to deny all the elements of the case against him,' "[22] and noted that Taylor had done nothing more in his direct testimony than deny ownership of the specific contraband taken from the automobile at the time of his arrest. Even if he had made a general denial of the crime of pessession of narcotics, the court reasoned, "there is a world of difference between a technically inferable negation of one element of the crime charged, and the explicit and 'sweeping' claim of ignorance of all narcotics made by the defendant in *Walder.*"[23]

The *Taylor* majority also felt that the instant case was distinguishable from the United States Supreme Court decision in *Harris v. New York.*[24] In *Harris* the defendant denied making one of two charged sales of heroin and gave a detailed account of larcenous intent to sell baking powder represented as heroin in the second instance. To impeach Harris' credibility, contradictory excerpts from transcribed statements made by Harris during earlier interrogation by the police were read into evidence, although the custodial questioning had concededly been conducted in violation of *Miranda v. Arizona.*[25] Over a scathing dissent, the majority in *Harris,* assuming the prior statements to be true and those at trial false, concluded that:

> "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior *inconsistent* utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier *conflicting* statements."[26]

The California court pointed out that Taylor, unlike Harris, "offered no elaborate justification for his conduct, and the prior illegally obtained

21. *Id.* at 65. The *Walder* Court distinguished *Agnello* as a case in which the defendant did not of his own accord go beyond a denial of the elements of the crime with which he was charged. *Id.* at 65-66.

22. 8 Cal. 3d at 184, 501 P.2d at 924, 104 Cal. Rptr. at 356, *quoting Walder,* 347 U.S. at 65.

23. 8 Cal. 3d at 183, 501 P.2d at 924, 104 Cal. Rptr. at 356.

24. 401 U.S. at 222 (1971).

25. 384 U.S. 436 (1966).

26. 8 Cal. 3d at 184, 501 P.2d at 925, 104 Cal. Rptr. at 357, *quoting Harris,* 401 U.S. at 226 (emphasis by the California Supreme Court).

evidence was therefore not 'inconsistent' or 'conflicting' with that testimony. [Taylor] did not rely on the illegality of the impeaching evidence as a sword to commit perjury, but simply as a shield against the consequences of concededly improper police practices."[27]

The majority then determined that the constitutional error committed at trial was not harmless and reversed Taylor's conviction.[28] In the majority's view, the evidence against Taylor was circumstantial and "ambiguous at best."[29] Aside from testimony by the police as to the evidence obtained from the automobile, the primary evidence against Taylor was testimony by the woman arrested with him. She was an admitted heroin addict and prostitute who bore ill will toward Taylor for his continued protestations of innocence, which implicated her as the person guilty of the crimes with which he was charged. She acknowledged under oath having been promised leniency in exchange for her testimony against Taylor and, in fact, had not been prosecuted for several felonies to which she admitted, but had rather been allowed to plead guilty to a misdemeanor—possessing narcotics paraphernalia—and had been promised treatment for narcotics addiction at a state rehabilitation center.[30]

The dissent in *Taylor* disagreed strongly with the majority's conclusions. In Justice Burke's view, the *Harris* Court would allow the impeachment at issue in *Taylor*. The *Harris* decision authorized impeachment use of illegally obtained evidence in all but a very narrow, and as yet undefined, area. The Court, in allowing impeachment by prior inconsistent statements, relied on *Walder* and refused to attach any significance to the fact that the physical evidence used to impeach Harris related directly to the crime charged:[31] "[w]e are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in *Walder*."[32] The value of furnishing

27. 8 Cal. 3d at 185, 501 P.2d at 925, 104 Cal. Rptr. at 357.

28. *Id.* at 185-86, 501 P.2d at 925-26, 104 Cal. Rptr. at 357-58, *citing* Harrington v. California, 395 U.S. 250 (1969), *and* Chapman v. California, 386 U.S. 18 (1967).

29. 8 Cal. 3d at 185, 501 P.2d at 925, 104 Cal. Rptr. at 357.

30. *Id.* at 185-86, 501 P.2d at 926, 104 Cal. Rptr. at 358.

31. The use of tainted physical evidence having nothing to do with the crime charged or the circumstances surrounding the alleged event to impeach a defendant may be rationalized by the ability of the jury to still adjudge the defendant innocent, though feeling his credibility to be less than desirable. Where the trial testimony and the illegally-obtained evidence both relate to the same transaction, as in *Harris*, judicial abhorrence of letting the defendant get away with a seeming lie is also understandable. But neither of these circumstances comports with the desirability of imposing sanctions for obtaining evidence in contravention of the Bill of Rights. *See Reconstitution, supra* note 4, at 211.

32. 401 U.S. at 225.

tools for assessing a defendant's credibility was felt to outweigh any benefit to be derived from a rule excluding evidence obtained by illegal means. The fact that the *Harris* Court was willing to extend the *Walder* rationale to support impeachment use of Harris' statements obtained in violation of the Fifth Amendment, which *itself* provides for exclusion,[33] indicates the Court did not intend that a mere judicially-fashioned rule of exclusion, with its primary thrust toward deterrence of illegal police conduct, should preclude impeachment.

The dissent in *Taylor,* however, would seemingly go well beyond the limits of *Harris.* Justice Burke reasoned:

> [A]s we have seen, the jury could well have found that the illegally obtained evidence was inconsistent with an inference arising from defendant's direct testimony. The shield provided by the exclusionary rule should not be perverted into a license to commit perjury by way of a defense or to give misleading testimony on direct examination from which inferences of false matters could well be made by the jury.
>
> The fact that here the illegally obtained evidence *circumstantially* rebutted *an inference arising from defendant's direct testimony,* whereas in *Harris* the illegally obtained evidence *directly* rebutted *specific false statements on direct examination* also does not serve to distinguish this case from *Harris,* and the majority does not claim otherwise.[34]

Justice Burke argued that Taylor, in his direct testimony, had claimed that he never possessed the purse with the heroin in it; that this constituted a general denial of the crime of possession of narcotics; that such a denial is a denial of every fact essential to guilt; that one such fact is knowledge of the narcotic character of the substance; and that the impeaching evidence was introduced to contradict this denial of knowledge of narcotic character.[35] Using such a tenuous line of reasoning, an inference of false matters could be drawn from practically any denial by a defendant. In fact, Justice Burke seems to suggest that an inference arises whenever there is conflicting testimony, and that impeachment by illegally obtained evidence should be allowed whenever such an inference exists. Thus, it would appear that the dissenters in *Taylor* would not only allow impeachment use of the tainted evidence in cases such as *Walder* and *Harris,* but in virtually any case.[36] Fortunately,

33. *See Reconstitution,* supra note 4, at 200-01, 213.

34. 8 Cal. 3d at 189, 501 P.2d at 928, 104 Cal. Rptr. at 360 (emphasis in original).

35. *Id.* at 187, 501 P.2d at 926-27, 104 Cal. Rptr. at 358-59.

36. Justice Burke did observe that "[t]his is not a case where an involuntary statement was used for impeachment purposes, nor a case in which a prior conviction invalid under *Gideon v. Wainwright* was used to blacken the defendant's character and thus

none of the decisions to date have allowed such impeachment when a defendant merely denies commission of the charged crime.[37]

Additionally, the *Taylor* dissent, reading the testimony of Taylor's companion more favorably to the prosecution, concluded any assumed error was unprejudicial and harmless. Even discounting the companion's testimony, Justice Burke contended, the evidence overwhelmingly established that Taylor at least jointly possessed the discovered contraband or was guilty as an aider and abettor.[38] The majority, correctly it seems, refused to accept this contention since they recognized that the deeply implicated companion's testimony was crucial to any theory of guilt. When a criminal verdict depends so heavily upon the jury's judgment of the credibility of conflicting witnesses, it is difficult to conclude beyond a reasonable doubt that use of illegally obtained evidence to impeach the defendant's testimony did not affect the verdict.[39]

The line of cases commencing with *Agnello* and terminating in *Taylor* leaves the California criminal defendant in a quandary. *Walder,* restricting *Agnello* to its particular facts, allowed impeachment use of illegally obtained physical evidence not directly related to the charged crime where the defendant took the witness stand and made "sweeping claims" extending beyond a mere denial of the crime for which he was on trial.[40] The *Harris* Court allowed impeachment by tainted evidence relating to the actual crimes charged where, though not phrased in terms of "I didn't do it," Harris' testimony seemed little more than a denial that he had committed the crime of selling narcotics.[41] Following *Harris,* only a defendant with considerable temerity would have taken the witness stand in his own defense if there were illegally obtained evidence which he did not wish before the jury, whether that evidence was physical evidence or incriminating prior statements.[42] That the

damage his general credibility." 8 Cal. 3d at 189-90 n.2, 501 P.2d at 928 n.2, 104 Cal. Rptr. at 360 n.2 (citations omitted). He also noted, but did not discuss, the fact that a majority of the present United States Supreme Court had recently distinguished *Harris* as a case in which " 'the record of a prior conviction was used for the purpose of directly rebutting a specific false statement made from the witness stand.' " *Id., quoting* Loper v. Beto, 405 U.S. 473, 482 n.11 (1972).

37. The *Harris* decision, however, unlike *Agnello* and *Walder,* left unresolved the point at which a testifying defendant becomes subject to impeachment by unconstitutionally obtained evidence. *Reconstitution, supra* note 4, at 216; *see* 8 Cal. 3d at 190 n.3, 501 P.2d at 928-29 n.3, 104 Cal. Rptr. at 360-61 n.3.

38. 8 Cal. 3d at 190-91, 501 P.2d at 929-30, 104 Cal. Rptr. at 361-62.

39. *Id.* at 186, 501 P.2d at 926, 104 Cal. Rptr. at 358.

40. See text accompanying notes 20-21 *supra.*

41. See text accompanying notes 24-26 *supra.*

42. Although the defendant whose Fourth Amendment rights had been violated seemed to have no weapon to wield against impeachment use of tainted evidence, a

seemingly broad holding in *Harris* would be so easily distinguished and *Agnello* again introduced on the scene seemed improbable, if not impossible. It seems likely that had *Taylor* been before the United States Supreme Court the result would have been different.[43] How long this bright spot for the California defendant who is subjected to illegal police conduct will remain is uncertain. Beyond a doubt, defendants, prosecutors and trial judges are facing a difficult task in reconciling the various decisions and ascertaining when impeachment use of illegally obtained evidence is or is not permissible.

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glimmer of hope was afforded the witness claiming Fifth Amendment protection by the *Harris* Court's specification that the prior statements be "trustworthy." 401 U.S. at 224. *See Reconstitution, supra* note 4, at 213-15.

43. But consider the language quoted from Loper v. Beto, 405 U.S. 473 (1972), in note 36 *supra.*